FILED
SEP 23 1992
OFFICE OF THE CLERK

No. 92-163

IN THE

Supreme Court of the United States

October Term, 1992

JOSEPH R. DILEO, MARY A. DILEO,
WALTER E. MYCEK, JR., MICHELE A. MYCEK
and ARCELO REPRODUCTION COMPANY, INC.

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION

JARED J. SCHARF
Eleven Martine Avenue, 7th Floor
White Plains, New York 10606
(914) 682-9777

Counsel of Record for Petitioners

MORTON A. SMITH
Eleven Martine Avenue, 7th Floor
White Plains, New York 10606

TABLE OF CONTENTS

	page
ARGUMENT	2
CONCLUSION	6

TABLE OF AUTHORITIES

Cases:	**Page**
Douglas Oil Co. v. *Petrol Stops Northwest*, 441 U.S. 211 (1979)	4
Federal Insurance Deposit Corporation v. *Ernest & Whinney*, 921 F.2d 83 (6th Cir. 1990)	5
Ina Re Grand Jury Proceedings, 851 F.2d 860 (6th Cir. 1988)	3-4
United States v. *Interstate Dress Carriers, Inc.*, 280 F.2d 52 (2d Cir. 1960)	2-3
United States v. *John Doe, Inc. I*, 481 U.S. 102 (1987)	2,4-5
United States v. *Proctor & Gamble, Co.*, 356 U.S. 677 (1958)	2
United States v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983)	2-4
Statutes:	
Right to Financial Privacy Act, 12 U.S.C. 3401-3422 (1978)	3
12 U.S.C. 3420(a)	3
Rules:	
Federal Rules of Criminal Procedure	
Rule 6(e)	*passim*
Rule 6(e)(3)(A)(i)	4
Rule 6(e)(3)(A)(ii)	4-5
Rule 6(e)(3)(B)	4,5
Rule 6(e)(3)(C)(i)	3
Legislative History:	
1977 U.S. Code Cong. & Ad. News 527	3

No. 92-163

IN THE

Supreme Court of the United States

October Term, 1992

JOSEPH R. DILEO, MARY A. DILEO,
WALTER E. MYCEK, JR., MICHELE A. MYCEK
and ARCELO REPRODUCTION COMPANY, INC.

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION

Petitioners Joseph R. DiLeo, Mary A. DiLeo, Walter E. Mycek, Jr., Michele A. Mycek, and Arcelo Reproduction Company, Inc. respectfully submit this brief in reply to the Government's Brief in Opposition.

ARGUMENT

A. The government's position relies solely on its assertion that *United States* v. *Interstate Dress Carriers, Inc.*, 280 F.2d 52 (2d Cir. 1960), is valid. Petitioners based their argument on statutes and decisions of this Court subsequent to *Interstate Dress* which make its rationale untenable. The government does not address these arguments. It relies instead on the correct assertion that this Court's decision in *United States* v. *Sells Engineering, Inc.*, 463 U.S. 418 (1983), did not explicitly overrule *Interstate Dress*.

However, petitioners did not contend that *Sells* explicitly overruled *Interstate Dress*. Petitioners' argument was that *Sells* proceeds on the assumption that no grand jury information, regardless of its character (i.e. regardless of whether it is sought for its intrinsic value), may be disclosed without a court order. *Interstate Dress* analyzed disclosure only in terms of the five considerations for grand jury secrecy that were recognized by this Court in *United States* v. *Procter & Gamble, Co.*, 356 U.S. 677 (1958). In *Sells* and *United States* v. *John Doe, Inc. I*, 481 U.S. 102 (1987), however, this Court recognized another basis for grand jury secrecy: to prevent the grand jury's coercive powers from being used for civil or administrative purposes. *Sells*, 463 U.S. at 432-433; *Doe*, 481 U.S. at 114-115. Based in part on that rationale, the court in *Sells* refused to permit disclosure of "grand jury materials" to the government's civil attorneys without a court order. Thus, under *Sells*, the *Interstate Dress* analysis is obsolete.

This Court in *Sells* also recognized Congressional intent, and, indeed, Justice Department practice, to prevent government civil attorneys from having access to grand jury developed evidence for civil law enforcement purposes. This intent was found in the legislative hearings and reports in connection with the amendment to Rule 6(e) in 1977. The deputy attorney general testified before a House subcommittee that it would be a bad idea to allow agency personnel to use grand jury materials for civil purposes and that neither the proposed amendment nor current practice would allow such use. *Sells*, 463 U.S. at 439. The deputy attorney general then testified:

> *It would be the practice of the Department at the time to seek a 6(e) order from the court that that evidence could be made available for whatever civil consequence might ensue.*

Id. (Emphasis in *Sells* opinion.) This Court also quoted extensively from the Senate Committee Report. " 'Federal prosecutors' are given a free hand concerning the use of grand jury materials . . . but disclosure of '*grand jury developed evidence* for civil law enforcement purposes' requires a (C)(i) order." *United States* v. *Sells Engineering, Inc.*, 463 U.S. at 441-42 (emphasis added); *see*, S. Rep. No. 95-354, 95th Cong., 1st Sess. 8 (1977), *reprinted in* 1977 U.S. Code Cong. & Ad. News 527, 532 (civil use of grand jury developed evidence requires a court order).

This intent that underlay the 1977 legislation was made official the following year. In 1978, in the Right to Financial Privacy Act (12 U.S.C. 3401 et seq.), Congress extended the requirements of Rule 6(e), Federal Rules of Criminal Procedure, to disclosure of "financial records" when such records are "obtained from a financial institution pursuant to a subpena issued under the authority of a Federal grand jury." 12 U.S.C. 3420(a).

In light of these clear judicial, legislative, and even Department of Justice expressions, the reasoning of *Interstate Dress* is no longer valid. While it is true, as the government argues, that *Sells* did not overrule *Interstate Dress* explicitly, it was not petitioners' contention that it did. All petitioners argued was that *Sells* was one clear expression, among others, that *Interstate Dress* is no longer viable. The government has not addressed petitioners' real argument.

In *Sells*, this Court precluded the government's civil attorneys from obtaining "grand jury materials" without an order from the District Court pursuant to Rule 6(e). Now the government says *Sells* does not apply to documents that do not reveal what took place before the grand jury and that I.R.S. attorneys can determine on their own when they are entitled to receive disclosure of such documents. In essence, the government would re-write *Sells* and say it applies only to transcripts of testimony and whatever documents might reveal what took place before the grand jury. However, the "grand jury materials" involved in *Sells* were not conceptually different from the bank records involved herin.

The government also asserts that *In Re Grand Jury Proceedings*, 851 F.2d 860 (6th Cir. 1988), does not conflict with the decision of the Second Circuit in the present case. This is incorrect. The Sixth Circuit remanded a case to the District Court for reconsideration of the latter's disclosure order in light of the concern expressed

in *Sells* and *Doe* that the grand jury's coercive powers not be abused to further the government's civil discovery. 851 F.2d at 866-867.

Contrary to the government's assertion, the District Court's order herein did not authorize disclosure of the grand jury materials; those materials had already been disclosed years earlier. All the District Court purported to authorize was the "use" of the materials. (App. 63A.) However, nothing in Rule 6(e) empowers the District Court to authorize a "use" of grand jury materials. Furthermore, the records were not specified in the order (they were described only as "certain pre-existing documents" (*id.*)), and the required showing of particularized need for disclosure of grand jury documents was not made. *See, Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211 (1979). Moreover, the District Court did not perform a suppression analysis following its conclusion that the government had committed "egregious" violations of Rule 6(e). (App. 57A-62A.) For any of these reasons, the order was not sufficient.

B. The government contends that, absent proof by taxpayers of an actual improper disclosure, agents who previously assisted a grand jury, pursuant to Rule 6(e)(3)(A)(ii), may later serve as essential personnel for the government in a civil proceeding. Petitioners urge that it would be virtually impossible for the government's civil litigation opponents to prove that an improper disclosure was made to the government attorney, and therefore, a prophylactic rule is required that would prohibit (a)(ii) agents from participating in related civil proceedings. The Court recognized the need for such a rule in a similar context in *Sells*, 463 U.S. at 432.

The government bases its argument on *United States* v. *John Doe, Inc. I*, 481 U.S. 102 (1987). However, the logic of *Doe* does not apply to (a)(ii) personnel. The government attorneys in *Doe* received disclosure properly pursuant to Rule 6(e)(3)(A)(i) and did not disclose the information to anyone else. The non-attorney involved in this case, Special Agent Kirschen, also received the disclosures properly in the first instance, pursuant to Rule 6(e)(3)(A)(ii). However, he is precluded from disclosing the grand jury information based on Rule 6(e)(3)(B). The government could have used any other government agent as its essential person at the civil trial, and there would be no cause for concern about

improper disclosure. In *Doe*, it made sense to use the same attorneys in the criminal and civil cases in order to avoid the need for a new group of attorneys who would have to learn the complex case. As to (a)(ii) personnel, however, it is the intent of Rule 6(e) to require that new personnel, who are not familiar with the grand jury evidence, be assigned to the civil matter. *See*, Rule 6(e)(3)(B).

Where the (a)(ii) agent serves in a civil capacity, there is a potential for abuse, even if only in the form of a subconscious disclosure to the government civil attorney.* The government's civil opponents should not be required to prove that an improper disclosure actually was made. The mere presence of the (a)(ii) agent as an essential person in a civil trial undermines confidence in the strict controls that Rule 6(e) is intended to impose.

C. Finally, certiorari should be granted in this case because the issue is important and the law is unclear and susceptible to inconsistent applications. In this case, the government sought disclosure and argued that the records it sought could be disclosed without a court order as they are not "matters occurring before the grand jury." In other cases, the government's litigating opponents often request disclosure, and the government opposes disclosure based on the agrument that the documents sought are "matters occurring before the grand jury" and that a court order is required. *See, e.g., Federal Deposit Insurance Corporation* v. *Ernst & Whinney*, 921 F.2d 83, 87 n. 1 (6th Cir. 1990).

Indeed, in this very case, the government successfully opposed disclosure to petitioners of other bank records based on the argument that those bank records do constitute "matters occurring before the grand jury." (App. 5A, 59A-60A, 79A-80A.) Certiorari should be granted not only to resolve the conflict between the Sixth and Second Circuits, but to resolve the conflict in the government's own litigation positions.

---

* Surely, improper disclosures had to have been made by the agent in order for the District Counsel attorneys to have known what they knew about the grand jury records. The civil attorneys knew that Special Agent Kirschen was the person with whom to communicate about the records and that they could direct him to travel to their office building in Albany to produce the records that he had stored there previously. (App. 83A, 89A-91A, 92A-93A.) They knew the banks did not possess the records and would consent to disclosure of the records which were located in the civil attorneys' office building. The civil attorneys could not have known this information from public documents in the criminal cases against DiLeo and Mycek.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

JARED J. SCHARF
Eleven Martine Avenue, 7th Floor
White Plains, New York 10606
(914) 682-9777

Counsel of Record for Petitioners

MORTON A. SMITH
Eleven Martine Avenue, 7th Floor
White Plains, New York 10606

Attorneys for Petitioners

September, 1992